

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**UNITED STATES POSTAL SERVICE**

**and**

**Case 9–CA–161711**

**ADAM WAUGH, An Individual**

*Jonathan Duffey, Esq.*, for the General Counsel.

*Mark Wilson, Esq.*, for the Respondent.

**DECISION**

**Statement of the Case**

**JOEL P. BIBLOWITZ, Administrative Law Judge.** This case was heard by me on April 7, 2016, in Jackson, Ohio. The complaint, which issued on January 27, 2016, was based upon an unfair labor practice charge and a first amended charge filed by Adam Waugh on October 9, 2015<sup>1</sup> and January 7, 2016. The complaint alleges that Waugh complained that he should be paid for his time travelling between different work facilities and that Supervisor Perry Howell was performing bargaining unit work, and that since on about June 4 the United States Postal Service (the Respondent), reduced his work hours, and on about July 13, it refused to renew his city carrier assistant position, in retaliation for those protected concerted activities. It is also alleged that on about May 28 the postmaster, Michelle Arnold, threatened him by saying that if he continued to ask for travel time his work would be reduced, that on about June 4, Supervisor Howell coerced him by conducting a predisciplinary (PDI) interview with him, threatened that he was digging a hole that he would not be able to get out of if he insisted on pursuing the grievance about Howell performing bargaining unit work, coerced him by saying that he was the bad guy for discussing possible contractual violations and asking about filing grievances, and threatened that he would no longer be given work opportunities outside the Respondent's facility because of his grievances, all in violation of Section 8(a)(3) and (1) of the Act.

**I. Jurisdiction and Labor Organization Status**

Respondent admits, and I find that the Board has jurisdiction over it by virtue of Section 1209 of the PRA and that the National Association of Letter Carriers, AFL–CIO and National Association of Letter Carriers, AFL–CIO, Branch 1252 (Branch 1252 or the Union), are labor organizations within the meaning of Section 2(5) of the Act.

**II. The Facts**

**A. Employment at the Jackson Post Office**

Waugh was hired by the Respondent on July 26, 2014, as a city carrier assistant (CCA). This position is for a 360- day term and he is guaranteed 2 hours' of pay if he is called in, but is not guaranteed a certain number of hours per week. He was initially hired for the Gallipolis, Ohio

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<sup>1</sup> Unless stated otherwise, all dates referred to herein relate to the year 2015.

Post Office, but requested to transfer to the Jackson, Ohio Post Office (the facility) and on February 21 he was transferred to the facility. In addition to Arnold, the supervisor at the facility was Perry Howell and Paulette Miller was the union steward. At the time Waugh got the transfer, the facility had six regular mail carriers and one other CCA, Keith Collins, who began working at the facility in April 2014. The procedure was that when the facility did not need Waugh for the full day, Howell called other post offices in Southern Ohio to see if they needed him and, if they did, he travelled to the other facilities. While travelling, Waugh was paid for his mileage, but not the time spent travelling. Waugh's mother has been employed at the facility for about 24 years.

On January 7, Arnold sent an email to the manager of post office operations stating that effective January 31, one of her city carriers, Burcham, was retiring, which would bring her number to six and requested that she obtain a CCA to be shared with the Waverly, Ohio Post Office<sup>2</sup>. This request was approved later that day. The reason for the request for the reassignment of Waugh from Gallipolis to the facility was "Reduction of Overtime. CDV<sup>3</sup> currently at 7.23. Staffing at 7." When Waugh transferred to the facility he covered a route when one of the regular carriers was absent and assisted if the facility's volume of mail was higher than anticipated. Otherwise, he worked at another postal facility if work was available.

#### Waugh's Work Locations

<u>Month</u>	<u>Only Jackson</u>	<u>Jackson and Other(s)</u>	<u>Others Only</u>
February	1	5	0
March	5	14	7
April	7	15	3
May	5	2	16
June	5	1	17
July	3	2	5

#### Hours Worked at the Facility

<u>Pay Period</u>	<u>Regular Hours</u>	<u>Overtime Hours</u>	<u>Waugh's Hours</u>
12/27	159	13	
1/3	201	17	
1/10	200	12	
1/17	195	8	

<sup>2</sup> The Respondent's records state that carrier Gary Conley was absent from work due to sick leave or a scheduled day off from December 3, 2014, through January 15. Arnold testified that he was having knee replacement surgery and anticipated that he would require 8 to 12 weeks recovery. She also testified that Miller was being treated for problems with her neck and was unsure if she would have surgery or be in traction, anticipating her absence for a period of weeks to months. She was absent from work due to sick leave days and scheduled days off from December 5 to 20, 2014 and 4-1/2 hours sick leave on January 13. Carrier Burcham was on sick leave, annual leave, and leave without pay from at least December 27, 2014 through February 6, and never returned to work.

<sup>3</sup> CDV is the number of employees that the facility should have depending upon the volume and size of the mail and "street times that are established for the routes based on evaluation by examiners of those routes." In other words, time studies.

	1/24	214	11	
	1/31	215	3	
	2/7	240	4	
5	2/14	176	14	
	2/21	281	27	43
	2/28	262	16	37
	3/7	269	12	36
	3/14	259	3	36
10	3/21	304	14	32
	3/28	284	12	37
	4/4	273	4	33
	4/11	266	9	32
	4/18	255	6	29
15	4/25	279	11	33
	5/2	258	8	30
	5/9	260	12	23
	5/16	288	4	32
	5/23	205	6	26
20	5/30	283	14	26
	6/6	275	9	27
	6/13	265	9	22
	6/20	261	7	44
	6/27	270	13	35
25	7/4	241	10	32
	7/11	255	12	12

**Post Discharge Hours at the Facility**

	7/18	261	15
30	7/25	260	20
	8/1	250	30
	8/8	239	20
	8/15	278	11
	8/22	247	31
35	8/29	280	15
	9/5	235	12
	9/12	268	16
	9/19	240	11
	9/26	267	6
40	10/3	251	14
	10/10	243	12
	10/17	273	4
	10/24	280	10

**B. Waugh's Protected Activity**

Counsel for the General Counsel alleges that Waugh was given less work and his contract was not renewed for another year in July because he engaged in protected concerted activities, by requesting to be paid for his travel time from one facility to another, in addition to his mileage, and for complaining about Howell's performance of bargaining unit work at the facility. Waugh testified that at some unspecified time his mother told him that an employee at another facility had won a grievance for travel time and that the steward at that facility said that CCAs were entitled to travel time. Waugh called him and explained his situation and he sent

Waugh some documents which allegedly showed that he was entitled to be paid for travel time. On May 2 Waugh asked Miller whether he was entitled to be paid for travel time and she told him no, and that he should drop it. On the following week he called John Collins, the business agent, and asked if he was entitled to travel time and Collins said that he was not entitled to be paid for travel time. He testified that after delivering his mail on May 28 he asked Arnold whether he should remain clocked in while driving to a different facility and she said no, that he was not entitled to travel time; that it was only for full- time employees. She told him that there was a Memorandum of Understanding between the parties to that effect and when he asked if she was sure that he was not entitled to it, she said that she was 99 percent sure. He asked what if she was wrong, and testified that she responded: "And she said I better watch it because if I try to push it, that I'll lose hours because they'll come out of the other office's budget, and that they won't want me." Later that day he sent an email to Rod Smith, the steward at another facility, stating, inter alia: "When I talked to Michelle earlier she told me that she was 99% percent sure she was right and I asked her what if she was wrong. And she said that I need to watch what I do because I will lose hours because it will come out of the other office's budget."

Arnold testified that on May 2 Miller told her that Waugh had asked her whether he should be paid for mileage and hours of travel. She asked Miller if there would be a grievance filed about it, and a few days later Miller told her that there would not be a grievance. On May 28 Waugh asked her whether he was entitled to be paid for his travel time between facilities, and she told him that she was 99 percent sure that he was only entitled to be paid for mileage, not travel time:

I also had tried to explain to Mr. Waugh that it didn't even make fiscal sense for the Postal Service in general to employ all CCAs throughout the country and pay them for mileage and travel time and their work hours, that that wouldn't be fiscally responsible to the budget of the Postal Service."

At the time of this conversation, she had a Memorandum of Understanding between NALC and the Postal Service that provided that CCAs who were required to work outside their employing office would receive payment for their mileage and she told him that based upon this, he was not entitled to be paid for his travel time in addition to his mileage. Waugh did not say that he was going to file a grievance on the subject and she did not indicate what she would do if he did file a grievance. She did not tell him that either she, or another facility, would cut his hours if he filed a grievance. On July 14 Waugh filed a grievance on this subject and the Respondent answered that the grievance was untimely and procedurally defective.

During the term of his employment at the facility Waugh also complained about the fact that Howell was, at times, performing bargaining unit work. Waugh testified that on May 2, his mother told him that Howell was casing and carrying the mail. He called Collins and told him about this, but no grievance was filed about it at that time. On May 30, while he was working at another post office, his mother told him that Howell cased and carried a full route of mail. He called Miller and told her what his mother said and that he wanted to file a grievance about it. She told him to do it himself. He then called Collins and told him what Miller had said and Collins told him that he could file it himself if he wanted to, but that Miller should do it for him.

Waugh testified that on June 4 Howell told him that there would be a meeting with him that day in Arnold's office attended by Miller, and Howell. At this meeting, Miller accused Waugh of lying to Collins by telling him that she would not file his grievance and Waugh responded by saying that he didn't tell Collins that, he told him that she saw Howell performing bargaining unit work every day without doing anything about it. Howell then came into the office and told them that he would be conducting a (PDI) regarding a shift that he had at the Wellston Post Office

over the weekend. He asked Waugh why it took him so long to deliver the mail that day. Waugh responded that he had only worked there on three or four other occasions and was not familiar with the route and that when he returned to the office after delivering the mail, he could not find the office bar code to swipe with his scanner: "I looked everywhere for it. Spent about five minutes looking for it. There was no management or nobody in the post office at that time. And then I eventually just hung up my scanner, I clocked out, and I drove to Waverly." Waugh testified that this conversation with Howell lasted for about 10 minutes, "... and then the topic went over ... switched over to why I filed a grievance." Howell told him that none of the carriers would be able to get time off if he didn't carry mail and reminded Waugh that he told Howell that he liked getting paid for mileage and Waugh said that while he liked being paid for mileage, he would rather be working in Jackson. He testified that Miller was angry at him because one of the grievances that he filed was when Howell carried mail was for Miller, who wanted to be off to attend her son's track meet, and that: "Howell told me that I'm digging myself a hole that I won't be able to get out of. He mentioned that they don't have to hire me back, and Paulette Miller is nodding her head agreeing with everything Perry Howell says." Waugh said that they were making him feel like the bad guy, and Howell said, "You are the bad guy here." When the meeting ended, Miller said, "Well, I guess, the carriers will never be able to get any time off anymore." Waugh also testified that at this meeting Howell told him that he would not let him work at other offices anymore, he would only be working in Jackson, and Waugh said that he wanted to work in Jackson.

Arnold testified that under article 3 of the contract between the parties, supervisors may perform bargaining unit work in an emergency situation, which could arise on an as-needed basis, but not a regular basis. This could be caused by an unscheduled absence, somebody leaving work early, an accident or injury, or a late arrival of the truck bringing the mail to the facility. On these occasions, she or Howell would call other nearby facilities for assistance and if there was nobody available, Howell would perform the work. In addition, on April 9, all seven carriers at the facility signed a document stating that they give Howell permission to case and carry the mail "on an as needed basis." After Waugh filed the grievance on June 8, she investigated it and assisted Miller in how to handle it. On about June 11 the parties agreed to settle Waugh's grievance by paying him for 3-1/2 hours at his regular pay rate. Arnold testified that she did not retaliate against Waugh for filing the grievance and it had a minimal effect on the budget of her facility. The June 4 PDI resulted from a complaint received from the Wellston Postmaster Henry Vallette on June 3 at 5:26 complaining that Waugh took too long to deliver the mail at that facility on Saturday, May 30. She was not present at the PDI, but Waugh was not penalized for his actions at the Wellston facility.

Miller testified that management can perform bargaining unit work on an as needed basis where the facility was unable to bring another carrier in to cover or if a carrier had to leave because he/she was ill. She was asked if at the PDI there was a discussion of Howell performing bargaining unit work and she testified that they said that all the carriers had signed the petition stating that he could perform the work.

Howell testified that if an emergency arises or if somebody calls in sick and there are not enough carriers to cover the routes, he would "help out." Before doing so he would call other nearby post offices to see if anyone is available to assist. If not, he would give the work to the other carriers or perform it himself. In addition, he had an arrangement with the carriers at the facility that if they needed him to cover for them for a personal or emergency reason, "it was okay for me to carry." On one occasion in April, while he was carrying some mail for another carrier, he met Waugh who was working at the facility that day, and told him that he was carrying mail for another carrier, but was not trying to take work away from him and Waugh said that he was fine with it. On May 28 Waugh was working at another facility and when he returned

to Jackson he told Howell that he wanted to carry mail in Jackson and he didn't want Howell carrying mail, and Howell said that was fine, he wouldn't carry mail anymore. Howell testified that he told Waugh that the problem with that was if he gave him the 2 hours' work in Jackson, the work that Howell was covering, by the time Waugh completed that work it would be too late for him to get a longer period of work at another postal facility.

On June 4 Howell attended the PDI with Waugh and Miller regarding an allegation by the Wellston postmaster that it took Waugh 2 hours to perform 1 hour's work. He told Waugh about this allegation and also told him that another office needed him that day and called him, but he never returned their call. Waugh said that he thought that he was guaranteed 2 hours' work at each facility and Howell said he was wrong, it was 2 hours total per day. Waugh also said that if he wasn't scheduled why should he have to return the call and that by the time he learned of the call, it was too late to call back. Howell also testified that Waugh said that he didn't understand why he had to work at different offices when he wanted to work at Jackson.<sup>4</sup> Howell responded, "that if he only wanted to work in Jackson that due to the lack of need that he would probably only get about 2 hours per day, as opposed to getting many more hours by working at various offices. Plus get paid for mileage between offices." Howell was asked:

Q. Okay. So did you then have any further conversation about you performing bargaining unit work on that day, June 4?

A. No.

Q. So the conversation you had was earlier in the week?

A. The last conversation I had about me doing work was the day after Memorial Day. After that, I ceased doing it and we had no more conversations about it.

He testified that the events at the Wellston facility and Waugh's failure to return another facility's phone call were the sole reasons for the PDI. Counsel for the General Counsel moved into evidence a statement dated June 4 and signed by Howell and Miller referring to a meeting that day with Waugh and Miller "for a PDI." The statement says:

During our meeting I asked Adam Waugh if two months prior I had talked to him about myself carrying mail to help out and him going to other post offices to work. Stating that he would be getting more hours plus mileage pay. At that time he said that he was fine with that because he was putting away mileage money for a new car.

When I asked him if he remembered that conversation he said yes, he did and he had no problem travelling to other offices.

Howell's handwritten notes of his questions and Waugh's answers at this meeting were also introduced into evidence by counsel for the General Counsel. These notes contain nine questions that he asked Waugh together with Waugh's responses. None of these questions relate to Howell's performing bargaining unit work. Waugh testified: "And Paulette, in this meeting, was very angry with me because one of the grievances I filed over Perry Howell carrying mail was for Paulette Miller to get off to attend her son's track meet." However, as stated by counsel for the Respondent in his brief, as of June 4, Waugh had not filed a

<sup>4</sup> On rebuttal, Waugh testified that he never said that he only wanted to work in Jackson. He said that he wanted to work in Jackson first.

grievance; it was filed on June 8.

On July 27 Waugh filed a grievance alleging that management violated the contract due to management performing bargaining unit work. There was a step A meeting on August 7 at which the parties agreed that Waugh and Keith Collins would be paid for 1 hour at the overtime rate and that management would cease and desist from performing this work.

Waugh testified that on July 13 Arnold told him that she was unable to rehire him back as a CCA because she “didn’t have enough room for him,” but that she heard that the Marietta facility, which was a 2-hour drive from the facility, was hiring. He told her that he couldn’t drive 2 hours every day to work. Arnold testified that Waugh’s contract was not renewed in July because the facility had a full staff and less mail volume. On July 13 she called him into her office and told him that based upon the work hours and the CDV for the facility, she could not renew him for the next year. He asked what his options were and she named larger postal facilities such as Chillicothe (about a 30-minute drive), Portsmouth, Wellston (about a 15-minute drive) and Waverly (about a thirty minute drive), in addition to Marietta. He asked if he obtained employment at those locations would he receive travel pay and she answered that he would get what he is entitled to. She testified that the sole reason that she did not renew his agreement was that she didn’t have any work for him. Howell testified that shortly before July 13, Arnold asked him what they should do about Waugh since they didn’t have enough work to keep him at the facility. Howell said that they could find him another post office where he can be based out of, and if need be, they can request that he come to the facility. Although nobody was hired to replace him, over the following 6 months, six or seven CCAs came to the facility from other post offices in the area for a total of about 42 hours to cover for regular carriers on leave or unscheduled absences. A summary prepared by Arnold states that from July 17 to December 30, Collins worked all or part of the day at other postal facilities on fifty two days.

### Analysis

It is initially alleged that the Respondent violated Section 8(a)(1) of the Act by Arnold’s statement to Waugh on May 28 about travel time and by Howell’s statement to him on June 4 about Howell performing bargaining unit work. Waugh testified that after he inquired about whether he was entitled to be paid for his travel time between the facilities, Arnold told him that he’d “. . . better watch it because if I try to push it, that I’ll lose hours because they come out of the other office’s budget and that they won’t want me.” Arnold testified that in response to Waugh’s inquiry, she told him that it didn’t make fiscal sense for the Post Office to employ all CCAs throughout the country and to pay them for mileage, travel time and for their work hours. I found Arnold to be a totally credible and believable witness and credit her testimony. She spent a substantial amount of time testifying, and her demeanor and testimony establishes that she is an articulate and thoughtful individual, not one to make the statement that Waugh attributes to her. I therefore recommend that this allegation be dismissed. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

It is next alleged that on June 4, the Respondent, by Howell, took the following action toward Waugh in retaliation for his complaints about Howell performing bargaining unit work: (a) coerced him by conducting a PDI with him; (b) threatened him that he was “digging a hole he could not get out of” if he insisted on pursuing a grievance about Howell performing bargaining unit work; (c) coerced him by telling him that he was the “bad guy” for discussing possible contractual violations and asking about filing grievances; and (d) threatening him that he would no longer be given work opportunities outside of Jackson because of his grievance filing activities. Howell testified that the PDI was unrelated to Waugh’s complaints about him performing bargaining unit work. Rather it resulted from a June 3 complaint by the Wellston

postmaster that Waugh took 2 hours to perform 1 hour's work and that Waugh did not return a call from a post office that needed him. He also testified that when Waugh told him that he didn't understand why he had to work at different offices when he wanted to work at Jackson, Howell told him that Jackson often had only 2 hours' work for him while he could probably get more hours, plus mileage, by working at other offices as well. There is a clear credibility issue here, and I credit Howell's testimony over that of Waugh. The evidence establishes that the PDI resulted from the complaint of the Wellston postmaster regarding Waugh's actions on May 30. In addition to the fact that I found Arnold and Howell more credible than Waugh, and find no credible evidence of animus toward him because of his complaints and grievances, Waugh admitted that he was not familiar with the route and could not locate the scanner at Wellston and left without the required scan. In addition, two grievances that he filed after this meeting were settled by payments to him. Further, after observing Howell, I do not see him telling Waugh that he was digging a hole for himself and he was the bad guy for complaining. And while Waugh testified that at this meeting Howell told him that he would not let him work at other offices anymore the record establishes that during the 6-week period from this meeting until his contract expired he was employed at Gallipolis and other postal facilities on 28 days. Although Waugh's testimony is supported by his text message to Smith, I credit Howell that he told Waugh that if he wanted to work only in Jackson, due to the lack of need he might only get 2 hours' work there, while other offices could give him more work as well as mileage.

Under *Gissel*, supra, an employer is free to communicate his views about unions or, in this case, concerted activities, "so long as the communications do not contain a threat of reprisal or force or promise of benefit." 395 U.S. at 618. Predictions concerning the precise effects of unionization or concerted activities, however, "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." The Court further cautioned that

If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

I find that Howell's credited statement was based upon objective fact. Since Waugh began working at the facility, a large majority of his worktime was spent at other nearby post offices and it was unlikely that this situation was going to change. I therefore recommend that the allegations regarding the June 4 meeting be dismissed.

The final allegations are that since June 4 the Respondent reduced Waugh's work hours and on July 13 the Respondent failed to renew his contract as a CCA because of his Union and protected concerted activities, in violation of Section 8(a)(1)(3) of the Act. Under *Wright Line*, 251 NLRB 1083, 1089 (1980), in Section 8(a)(1) or (3) cases turning on employer motivation, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. If that is established, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. I find that counsel for the General Counsel has not sustained the initial burden under *Wright Line* that Waugh's protected conduct was a motivating factor in the Respondent's decision not to renew his contract or to limit his hours. Because I found Arnold and Howell more credible than Waugh I have previously recommended that the 8(a)(1) allegations relating to May 28 and June 4 be dismissed. In addition, I credit Arnold's testimony that Waugh's grievances, and the settlements of some of them, were not a big deal to her or to the Respondent. As for Waugh's complaints about Howell performing



bargaining unit work by carrying mail, it appears to me unlikely that Howell would be angry at Waugh for making these complaints. It is more likely that he would rather maintain his position as supervisor than case and carry mail for the other carriers, although the other carriers might have been annoyed at Waugh for changing this procedure. During the 5 months that Waugh was employed at the facility, he only worked 26 days exclusively at the facility. The amount of overtime worked at the facility for the period while he was employed at the facility is fairly similar to the post-July period with the exception of the weeks of August 1, when Yates was on leave, and August 22, when Conley was on leave,<sup>5</sup> and, during this period, Collins worked a substantial number of days at other facilities. Finally, this is not a case where the timing of the refusal to renew is suspect; Arnold had to make a decision, one way or the other, by mid-July when Waugh's yearly contract was due to expire whether to renew it. Having found that counsel for the General Counsel has not sustained his initial burden under *Wright Line*, I recommend that the allegations that the Respondent reduced Waugh's hours and did not renew his contract because of his protected activities be dismissed.

### Conclusions of Law

1. The Board has jurisdiction over the Respondent by virtue of Section 1209 of the PRA.

2. National Association of Letter Carriers, AFL-CIO and National Association of Letter Carriers, AFL-CIO, Branch 1252 are each labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1)(3) of the Act as alleged in the complaint.

On these findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended<sup>6</sup>

### ORDER

It is recommended that the complaint be dismissed in its entirety.

**Dated, Washington, D.C. May 27, 2016**



**Joel P. Biblowitz**  
**Administrative Law Judge**

<sup>5</sup> From February 21 through July 17 the average overtime was approximately 10 hours weekly, while for the latter period through the end of October, with the exception of the weeks of August 1 and August 22, the average overtime was approximately 12-3/4 hours.

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.